

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE)
)
 v.) ID No. 2102007152
)
KEVIN ULYSSES,)
)
 Defendant.)

Date Submitted: March 11, 2022
Date Decided: May 3, 2022

OPINION

*Upon Consideration of
Defendant’s Motion to Suppress: **DENIED.***

Jillian L. Schroeder, Esquire, Deputy Attorney General, Department of Justice, State of Delaware, 820 North French Street, 7th Floor, Wilmington, Delaware, Attorney for the State.

James O. Turner, Esquire, Office of Defense Services, 820 North French Street, 3rd Floor, Wilmington, Delaware, Attorney for the Defendant.

Jurden, P.J.

INTRODUCTION

Before the Court is Defendant Kevin Ulysses' Motion to Suppress¹ evidence seized as a result of an alleged unlawful detention and seizure in violation of rights guaranteed by the Fourth and Fourteenth Amendments of the United States Constitution, as well as Article 1, Section 6 of the Delaware Constitution. Defendant was detained shortly after Wilmington Police Department ("WPD") officers were dispatched to the area of Front Street and French Street, where a Lyft driver reported a man with a handgun. The Court has reviewed the parties' submissions, and held a suppression hearing on March 11, 2022. For the reasons that follow, Defendant's Motion to Suppress is **DENIED**.

FINDINGS OF FACTS

On February 17, 2021, a Lyft driver called 911 to report a man with a handgun in the area of Front Street and French Street in the City of Wilmington, Delaware. The Lyft driver described the man as a light skinned black male with facial tattoos, wearing a long coat and carrying several bags. The Lyft driver reported that this man was traveling on foot, eastbound on Front Street.

WPD Officer Harry Mann ("Officer Mann"), a three-year veteran of the police department, responded to the area of the Amtrak train station, located in the 100-200 block of east Front Street. Officer Mann contacted the Lyft driver, who

¹ D.I. 8.

remained in the area after making the 911 call.² The Lyft driver spoke with Officer Mann, confirmed the suspect description that he provided the 911 operator, and pointed in the direction where he last saw the suspect walking.

Several WPD officers canvassed the area for the suspect. At the same time, Officer Mann entered the Amtrak train station and reviewed video surveillance recordings from the Front Street side of the Amtrak train station. Officer Mann saw a suspect on the video recording who matched the Lyft driver's description of the suspect. Officer Mann was also able to obtain a still photo of the suspect from the Amtrak video, and showed that photo to the Lyft driver.³ The Lyft driver, still on the scene, confirmed that the man in the photo was the same person he reported to 911.

As WPD officers patrolled the area looking for the suspect, Officer Mann recalled that the Sunday Breakfast Mission, located at 110 North Poplar Street, was one of the only facilities in the area that was both open and accessible to the public when the police were looking for the suspect. As a result, Officer Mann responded to the Sunday Breakfast Mission.

² During the suppression hearing, Officer Mann described the Lyft driver's demeanor as frantic, concerned and alarmed. The Complaint and Warrant presented to Justice of the Peace Court 11 indicates that the suspect exited the Lyft driver's vehicle, told the driver he "had a gun," directed the driver to "not move," and left the area on foot, heading east on Front Street. D.I. 1.

³ D.I. 13.

At the Sunday Breakfast Mission, Officer Mann contacted a front desk employee and asked if a light skinned black male with facial tattoos, wearing a long coat and carrying several bags, had recently entered the Mission. Officer Mann also showed the employee the still photo of the suspect. The employee told Officer Mann that the suspect in the photograph had recently entered the Mission and was “in the back.” The staff member then walked WPD Officers Mann and Comer to the rear of the facility, where the suspect was found in the rear shower area. Upon contacting the suspect, the WPD officers instructed him to put his hands on the wall and keep his hands where the police could see them. WPD Officer Comer then began to pat down the outside/exterior of the suspect’s clothing, and he felt a gun through the suspect’s jacket pocket. After seizing a revolver, the police discovered that the suspect was also wearing body armor. The person who possessed the firearm while wearing body armor on the evening of February 17, 2021 was the Defendant, Kevin Ulysses.

On February 18, 2021, Officer Mann arrested the Defendant for the following offenses: Possession of a Firearm by a Person Prohibited, in violation of 11 *Del. C.* § 1448; Carrying a Concealed Deadly Weapon, in violation of 11 *Del. C.* § 1442; Wearing Body Armor During the Commission of a Felony, in violation of 11 *Del. C.* § 1449; and Terroristic Threatening, in violation of 11 *Del. C.* § 621.

PARTIES' CONTENTIONS

Defendant argues that the conduct of the police officers in searching the Defendant for a weapon was akin to an arrest, requiring probable cause. Defendant points to the fact that in Officer Mann's Affidavit of Probable Cause, the officer described the pat down of the suspect as a "search incident to arrest."⁴ Defendant further argues that the WPD officers lacked probable cause to order the Defendant to put his hands on the wall to pat him down for weapons. Defendant asserts that the conduct of the police was premature – to comply with 11 *Del. C.* § 1902,⁵ the police should have first asked the Defendant what his name was, his business abroad, maybe even whether he possessed a weapon or what happened, and whether he was at the scene.

The State contends the WPD officers only needed reasonable suspicion to conduct an investigatory detention and pat down for officer safety, and the officers' actions constituted a reasonable and legally permissible intrusion. Officer Mann was

⁴ D.I. 1. (Affidavit of Probable Cause, Ex. B at ¶ 5).

⁵ 11 *Del. C.* § 1902 provides:

(a) A peace officer may stop any person abroad, or in a public place, who the officer has reasonable ground to suspect is committing, has committed or is about to commit a crime, and may demand the person's name, address, business abroad and destination.

(b) Any person so questioned who fails to give identification or explain the person's actions to the satisfaction of the officer may be detained and further questioned and investigated.

(c) The total period of detention provided for by this section shall not exceed 2 hours. The detention is not an arrest and shall not be recorded as an arrest in any official record. At the end of the detention the person so detained shall be released or be arrested and charged with a crime.

investigating a possible Terroristic Threatening complaint involving the Lyft driver where the Defendant threatened the Lyft driver when he explicitly told the driver he possessed a gun and instructed him not to move. Because the Lyft driver told the 911 operator and the WPD officers that the Defendant said he possessed a gun, the officers were justified in believing the Defendant was armed and dangerous. The State asserts the officer limited his search to a pat down of the Defendant's outer clothing, and it was at that point a handgun was felt in the area of the jacket pocket of the suspect. Once the gun was seized from the Defendant's pocket, Officer Mann had probable cause to arrest him.

The State also distinguished the information provided by the Lyft driver from information provided in cases involving anonymous tipsters. The State contends that the information by the Lyft driver is inherently more reliable to this investigation because the Lyft driver called 911 to report the Defendant's conduct and statements, and he waited for the police to arrive on scene and spoke directly to Officer Mann, confirming the description of the suspect and providing the suspect's direction of travel.

With regard to Defendant's argument that the officer identified the search of the Defendant in the Affidavit of Probable Cause as a "search incident to arrest," the State asserts it is the conduct of the officer and the facts known to him at the time of the pat down search for weapons that is dispositive and determinative, not how a

police officer with relatively limited law enforcement experience labels the encounter in an Affidavit of Probable Cause.

DISCUSSION

The United States and Delaware Constitutions protect the right of persons to be secure from unreasonable searches and seizures.⁶ While warrantless searches and seizures are *per se* unreasonable, in certain circumstances, limited searches and seizures are reasonable, absent a warrant and when based on less than probable cause – when officers have a reasonable, articulable suspicion that a suspect is armed and engaged in criminal activity.⁷ Under these circumstances, officers are permitted to detain a suspect and frisk them for the presence of weapons.

In *Terry v. Ohio*, the United States Supreme Court held:

[w]here a police officer observes unusual conduct which leads him reasonably to conclude that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced as evidence against the person from whom they were taken.⁸

⁶ *Flonnory v. State*, 109 A.2d 1060, 1063 (Del. 2015) (citing U.S. Const. Amend. IV; Del. Const. art. I, Section 6).

⁷ *Miller v. State*, 25 A.3d 768, 771 (Del. 2011) (citing 11 *Del. C.* § 1902, *Terry v. Ohio*, 392 U.S. 1 (1968)).

⁸ *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968).

A *Terry* stop occurs when the “‘police restrain an individual for a short period of time’ and ‘requires that the officers have a reasonable suspicion that the suspect has committed or is about to commit a crime.’”⁹ A police officer is permitted to frisk a person that he has detained if he possesses a reasonable, articulable suspicion that the suspect is presently armed and dangerous.¹⁰ The purpose of the frisk is “not to discover evidence of a crime, but to allow the officer to pursue his investigation without fear of violence.”¹¹

In *State v. Murray*, the Delaware Supreme Court described the differences between an arrest and a *Terry* seizure:

An arrest occurs when a reasonable person would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest. By contrast, a *Terry* stop or seizure occurs when under all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he/she was not free to terminate the encounter with the officers.¹²

To assess whether a seizure is an investigatory detention or an arrest, the Court must consider the “reasonableness of the level of intrusion under the totality of the

⁹ *State v. Blackshear*, 2014 WL 1371797 at *2 (Del. Super. Apr. 7, 2014) (quoting *Quarles v. State*, 696 A.2d 1334, 1336-37 (Del. 1997)) (citing *Florida v. Bostick*, 501 U.S. 429, 439 (1991)).

¹⁰ *Id.* (citing *State v. Henderson*, 892 A.2d 1061, 1064 (Del. 2006)).

¹¹ *Id.* (quoting *Purnell v. State*, 832 A.2d 714, 721 (Del. 2003)) (quoting *Hicks v. State*, 631 A.2d 6, 11 (Del. 1993)).

¹² *State v. Murray*, 213 A.3d 571, 577 (Del. 2019) (internal quotation marks omitted) (quoting *Sornberger v. City of Knoxville*, 434 F.3d 1006, 1017 (7th Cir. 2006)); *Quarles v. State*, 696 A.2d 1334, 1336-37 (Del. 1997) (en banc) (citing *Florida v. Bostick*, 501 U.S. 429, 439 (1991)).

circumstances.”¹³ This analysis includes consideration of the following factors: (1) the amount of force used by the police; (2) the need for such force; (3) the extent to which the suspect’s freedom of movement was restrained; (4) the physical treatment of the suspect; (5) the number of agents involved; (6) the duration of the stop; and (7) whether the target of the stop was suspected of being armed.¹⁴

Specifically considering the detention and pat down of the Defendant, the Court finds that the conduct of the WPD officers was justified as an investigatory detention – a limited intrusion in light of the facts known to the officers at the time the Defendant was found in the Sunday Breakfast Mission. As to the first two factors, the amount and use of force to detain the Defendant – the uncontradicted suppression hearing testimony demonstrates that police did not exert any force upon Defendant. The police directed the suspect to place his hands on the wall and to keep them visible during the pat down, and the Defendant complied. As to the third factor, the restraint of the Defendant’s freedom of movement, the Defendant was not free to leave, but the restraint on his movement was reasonable, necessary and justified under the circumstances. The fourth factor – the physical treatment of the suspect – merely consisted of patting down the Defendant’s outer clothing. The fifth factor – the number of police officers present – does not weigh in Defendant’s favor.

¹³ *Blackshear*, 2014 WL 1371797 at *3.

¹⁴ *Id.* (citing *State v. Kang*, 2001 WL 1729126, at *6 (Del. Super. Nov. 30, 2001)); *State v. Biddle*, 1996 WL 527323 at *7 (Del. Super. Aug. 9, 1996), *aff’d* 712 A.2d 475 (Del. 1998).

There were two officers present, a reasonable number of officers to address officer safety concerns, and during this brief encounter neither officer engaged in intimidating or coercive behavior. Finally, as to the last two factors, the duration of the stop and whether the Defendant was suspected of being armed – Defendant’s detention was limited to the amount of time it took to him pat down, and the belief that the suspect was armed was amply supported by reasonable suspicion.

To that end, with regard to the officer’s belief that the suspect was armed, the Court concludes that the Lyft driver’s information is entitled to a heightened degree of reliability and credibility, more than a typical anonymous phoned-in tip.¹⁵ And, the content of the tip provided the police was detailed and specific. The WPD officers were dispatched to the area of the Amtrak train station on the report of a suspect with a gun. On scene, they located the reporting party, the Lyft driver, within minutes of the 911 call being received. The Lyft driver provided information about the Defendant in a face to face encounter with WPD Officer Mann, who had an opportunity to assess the Lyft driver’s credibility and demeanor. Officer Mann then viewed an Amtrak surveillance video, recorded minutes earlier, which corroborated the Lyft driver’s physical description of the suspect, and Officer Mann recovered a

¹⁵ Delaware courts have concluded that a citizen who provides face to face information regarding criminal activity is “more reliable than an anonymous telephone call,” because “the officer has an opportunity to assess the informant’s credibility and demeanor.” *Blackshear*, 2014 WL 1371797 at *4 (citing *Schneider v. State*, 2010 WL 3277434, at *2 (Del. 2010), *United States v. Valentine*, 232 F.3d 350, 354 (3rd Cir. 2000)). Here, the Lyft driver provided the police information that the driver had just observed shortly before calling 911 and speaking to the police in person.

still photo of the suspect from the surveillance video. The Lyft driver confirmed the suspect's appearance after reviewing the still photograph. A short time later, the police located the Defendant in the Sunday Breakfast Mission – in the same direction of travel as indicated by the Lyft driver. The Lyft driver's description of the suspect and related information was detailed and specific, and the Court finds the officer was entitled to rely on the tip to establish reasonable suspicion to believe Defendant was presently armed and dangerous.

Based on the totality of the circumstances, including the information provided by the Lyft driver, the Court finds the WPD officers possessed reasonable suspicion to believe Defendant was armed, justifying the brief detention and pat down of Defendant.¹⁶ Coupling these facts with the discovery of the firearm after the pat down, the police then established probable cause to arrest the Defendant.

¹⁶ Defendant suggests Officer Mann's statement in describing the pat down search of defendant as a "search incident to arrest" in the Affidavit of Probable Cause illustrates the officer believed Defendant was under arrest at the time of the pat down search, and, therefore, the police were required to demonstrate probable cause to justify his arrest. Considering the uncontroverted testimony of Officer Mann, the Court finds the limited *Terry* search and seizure of Defendant was supported by reasonable articulable suspicion, and under the totality of the circumstances, the brief detention and pat down of Defendant for the presence of weapons was lawful. The Court's analysis is guided by the conduct of the officers, not how a relatively inexperienced officer inaccurately labeled the encounter as a "search incident to arrest" in the Affidavit of Probable Cause.

CONCLUSION

NOW, THEREFORE, IT IS ORDERED that Defendant's Motion to Suppress is **DENIED**.

/s/ Jan R. Jurden
Jan R. Jurden, President Judge